

**IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

ZACHARY VERGARA, individually and on  
behalf of a class of similarly situated  
individuals,

Plaintiff,

v.

NINTENDO OF AMERICA INC., a  
Washington corporation,

Defendant.

No. 1:19-cv-06374

Honorable Gary S. Feinerman

Magistrate Judge Jeffrey T. Gilbert

**DECLARATION OF KRISTOPHER KIEL IN SUPPORT OF NINTENDO OF  
AMERICA INC.'S MOTION TO COMPEL ARBITRATION AND DISMISS**

I, Kristopher Kiel, declare as follows:

1. I am Senior Corporate Counsel with Defendant Nintendo of America Inc. ("Nintendo"). I have served in this role for 5 years. In this role, I oversee litigation and business matters. I am over the age of 18 and competent to testify to matters in this Declaration. I make this Declaration based on my personal knowledge.
2. The Nintendo Switch video-game console became available for purchase on March 3, 2017.
3. The Switch can be used as a traditional gaming console or as a portable gaming system to play video games in three modes: TV mode, tabletop mode, or handheld mode.
4. Each Switch comes with two Joy-Con controllers that are used to direct gameplay. The Joy-Con controllers can be used in several different ways. A player can use one or both controllers and can use the controllers vertically or sideways, attached to or detached from the gaming console.

5. Consumers can also buy extra Joy-Con controllers either individually or as a set of two.

6. During a purchaser's set-up of a new Switch, the user is presented with Nintendo's End-User License Agreement ("EULA"). The same version of the EULA has been in effect since the Switch became available for purchase.

7. Attached to this Declaration as **Exhibit A** is a true and correct copy of the EULA.

8. Attached to this Declaration as **Exhibit B** is a true and correct sequence of the screen displayed on the Switch presenting the EULA and requiring the purchaser to accept its terms before proceeding to use the Switch.

9. When a purchaser powers on the console for the first time to set up their new Switch, the screen first displays language and region options. Once the purchaser selects a language and region, the following screen—titled "End-User License Agreement"—informs the purchaser of the EULA.

10. The EULA notice is the only subject displayed and addressed on that screen.

11. The EULA notifies purchasers that if they do not want to agree to the EULA, they may stop the set-up process and for a full refund return their Switch to the retailer from which they bought it.

12. A purchaser cannot proceed to use the Switch or accompanying Joy-Con controllers without accepting the EULA.

13. Under the title on the set-up screen, Nintendo informs purchasers that "[b]y selecting the Accept button, you acknowledge that you have read and agree to be bound by the End-User License Agreement. If you do not agree, stop using this system."

14. Right under that text, there is a hyperlink button that allows the purchaser to immediately access—without an internet connection—the full EULA.

15. The hyperlink is prominently displayed as a box edged in pulsating bright blue that says, “View End User License Agreement.” The hyperlink is just above the box that the purchaser checks to accept the EULA, ensuring that the purchaser sees it before accepting the terms.

16. The purchaser cannot merely advance to the next screen without accepting the EULA; they must physically press the “Accept” button or scroll down and select it. After the purchaser accepts the EULA, a checkmark appears next to the “Accept” button, and the “Next” button transitions from an inactive gray-text box to an active black-text button. To further confirm that the purchaser has chosen to accept the EULA before proceeding, they must then physically press the “Next” button or scroll down and select it before proceeding to use the Switch.

17. Purchasers are also informed of the EULA on the standard packaging in which the Switch system is sold as well as on some Special Edition packages. That packaging tells purchasers that “[b]y using the Nintendo Switch system, you accept the license agreement available at [support.nintendo.com/Switch/license](https://support.nintendo.com/Switch/license).” The website referenced on the packaging directs the purchaser to choose a language and then immediately displays the EULA in full in the selected language.

18. Purchasers have two options if they do not want to agree to the EULA’s arbitration provision. They can decline to accept the EULA in its entirety and return the Switch for a full refund. Or they can otherwise accept the EULA but opt out of its mandatory individual

arbitration provision by providing written notice to Nintendo within 30 days of purchasing the Switch as described in the EULA.

19. Nintendo has reviewed the records it maintains of those purchasers who have provided written notice that they are opting out of arbitration and confirmed that Plaintiff Zachary Vergara did not opt out of the arbitration provision.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this 26<sup>th</sup> day of November, 2019, at Redmond, Washington.

By: \_\_\_\_\_

Kristopher Kiel

Exhibit A

Exhibit A

## Legal and Privacy Information

### Please select a topic

#### [Nintendo Privacy Policy](#)

#### [Health & Safety Precautions](#)

#### [IP Policy](#)

#### [Nintendo Account & My Nintendo](#)

#### [Nintendo Switch](#)

- [End User License Agreement \(EULA\)](#)
- [Nintendo Privacy Policy](#)
- [Health and safety information and usage guidelines](#)

#### [Nintendo 3DS/XL](#)

#### [Nintendo 2DS/XL](#)

#### [Wii U](#)

#### [Wii](#)

- [System User Agreements \(EULA\)](#)
- [Network Services Privacy Policy](#)
- [Health & Safety Precautions](#)
- [Code of Conduct](#)

#### [Nintendo DSi/Nintendo DSi XL](#)

#### [Hardware & Software Manuals](#)

#### [Animal Crossing: Pocket Camp](#)

#### [Dragalia Lost](#)

#### [Fire Emblem: Heroes](#)

#### [Super Mario Run](#)

#### [Regulatory Information](#)

#### [Repair Terms](#)

#### [Warranty Coverage](#)

#### [Website-Related Documents](#)

THIS IS AN IMPORTANT AGREEMENT THAT APPLIES TO YOUR USE OF THIS NINTENDO VIDEO GAME CONSOLE!

If you are under the age of 18 STOP! You must get your parent or legal guardian to read and accept this Agreement.

### End User License Agreement

This is an agreement (the "Agreement") between you and Nintendo of America Inc. (together with its affiliates, "Nintendo" or "we" or "our") and provides important information about your access to and use of this Nintendo video game console, its accessories, the Software (defined below), and any services available using this Nintendo video game console (the "Console").

Please read this Agreement carefully before using the Console. By clicking the "Accept" option, or by using the Console, you represent that you are 18 years of age or older (or the age of majority where you live) and agree to be bound by this Agreement. By clicking the "Accept" option, you acknowledge and agree that you are responsible for any use of the Console, including any use of the Console by other users, and are responsible for ensuring that all other users of the Console comply with the terms of this Agreement and any other applicable terms.

If you purchased the Console from an authorized retailer but do not agree to the terms of this Agreement, you may return the Console for a refund in accordance with the applicable return policy. All other users of the Console who do not agree to this Agreement must not use the Console.

Some of the services available through the Console are subject to and governed by separate terms and conditions. We will make such terms and conditions available to you through the applicable service. Your acceptance of such terms and conditions is required for you to use the applicable services in connection with the Console.

THIS AGREEMENT CONTAINS A BINDING ARBITRATION AND CLASS ACTION WAIVER PROVISION IN SECTION 7 THAT AFFECTS YOUR RIGHTS UNDER THIS AGREEMENT AND WITH RESPECT TO ANY "CLAIM" (AS DEFINED IN SECTION 7) BETWEEN YOU AND NINTENDO. YOU HAVE THE RIGHT TO OPT OUT OF THE PROVISION AS DESCRIBED IN SECTION 7.

#### 1. License Grant/Restrictions.

Subject to the terms of this Agreement, you may use the software, content, and data that came with the Console, or that is compatible with or authorized for use in connection therewith, including any updates or replacement to that software, content, or data that we or our authorized providers make available to you (collectively, the "Software"). The Software is licensed, not sold, to you solely for your personal, noncommercial use on the Console. You may not publish, copy, modify, reverse engineer, lease, rent, decompile, disassemble, distribute, offer for sale, or create derivative works of any portion of the Software, or bypass, modify, defeat, tamper with, or circumvent any of the functions or protections of the Console, unless otherwise permitted by law. Content obtained through the use of an unauthorized device, or through the unauthorized modification of Console hardware or software, may be removed. You agree not to use the Console in an unlawful manner or to access the consoles, devices, accounts, or data of others (including Nintendo) without their (or our) consent.

#### 2. Updates.

The Console is constantly evolving, and we may update or change the Console, in whole or in part. Such updates or changes to all or a portion of the Console (an "Update" or "Updates") may be required for you to play games, enjoy features, software, data or content, or continue to access services available through the Console. Some of these Updates may be provided automatically without notice to you. You consent to Nintendo providing you with, and installing, automatic Updates to the Console in the background with or without notice to you. You agree that any Update is governed by this Agreement.

After the Console is updated or changed (including without limitation in connection with an Update), any existing or future unauthorized modification of the Console or Software, or the use of an unauthorized device in connection with the Console, may render the Console and/or Software permanently unusable.

#### 3. Use of Information.

We may use and share information that you give to us and information that we collect when you use our products and/or services (including the Console) as described in our Privacy Policy, located on [support.nintendo.com](http://support.nintendo.com). This may include personally identifiable

information as well as anonymous or aggregate information about your use of the Console or the Console's performance. We recommend that you review our Privacy Policy before each use of a Nintendo product or service to help you stay informed of our privacy practices. Our Privacy Policy is designed to help you understand the types of information that we collect, how we use and share the information and how the information is protected.

**4. Nintendo Intellectual Property/Reservation of Rights.**

Nintendo owns all right, title and interest (including all intellectual property rights) in, and has the right to use and sublicense, the Nintendo Intellectual Property utilized in connection with the Console. "Nintendo Intellectual Property" refers to all intellectual property, including but not limited to registered and unregistered trademarks, logos, registered and unregistered designs, copyrights, database rights, inventions, patents, trade secrets, know-how, and other confidential and proprietary information which Nintendo developed, owns or is granted a license to use. Neither the sale, transfer, license, nor the use of the Console transfers any title or ownership of any of our intellectual property rights, including without limitation the Nintendo Intellectual Property. We reserve all rights that we have not expressly granted in this Agreement. Nintendo reserves all rights in the Nintendo Intellectual Property.

**5. Termination.**

Your rights under this Agreement will immediately terminate if you do not comply with any term of this Agreement. At the time of any termination of this Agreement, you will immediately cease all use of the Console. Our failure to insist upon or enforce your strict compliance with this Agreement will not constitute a waiver of any of our rights.

**6. Disclaimer of Warranties and Limitation of Liability.**

- A. THE LIMITATIONS OF LIABILITY SET FORTH IN THIS SECTION WILL NOT LIMIT OR EXCLUDE LIABILITY FOR THE GROSS NEGLIGENCE, INTENTIONAL MISCONDUCT OR FRAUD OF NINTENDO.
- B. USE OF THE CONSOLE IS AT YOUR SOLE RISK. NINTENDO IS NOT RESPONSIBLE FOR ANY NON-NINTENDO SITES, SERVICES, APPLICATIONS, CONTENT, DATA, MESSAGES, OR OTHER ITEMS THAT YOU ACCESS, USE, OR SHARE VIA THE CONSOLE. EXCEPT FOR ANY LIMITED WARRANTY THAT APPLIES TO THE CONSOLE, NO ORAL OR WRITTEN INFORMATION OR ADVICE GIVEN BY NINTENDO OR ITS REPRESENTATIVES CREATES A WARRANTY, THE CONSOLE IS PROVIDED "AS IS" WITHOUT WARRANTY OF ANY KIND AND, TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, NINTENDO DISCLAIMS ALL WARRANTIES WITH RESPECT TO THE CONSOLE, EXPRESS OR IMPLIED, INCLUDING, WITHOUT LIMITATION, THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.
- C. TO THE MAXIMUM EXTENT PERMITTED BY LAW, NINTENDO WILL NOT BE LIABLE TO YOU FOR ANY SPECIAL OR CONSEQUENTIAL DAMAGES OF ANY KIND ARISING OUT OF OR RELATING TO YOUR ACCESS, USE, MISUSE, OR INABILITY TO USE THE CONSOLE, EVEN IF NINTENDO HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. TO THE MAXIMUM EXTENT PERMITTED BY LAW, NINTENDO'S AGGREGATE LIABILITY TO YOU IN CONNECTION WITH ANY CLAIMS ARISING OUT OF OR RELATING TO THE CONSOLE IS LIMITED TO THE AMOUNT YOU ACTUALLY PAID FOR THE CONSOLE.
- D. IF A LAW RESTRICTS OUR ABILITY TO LIMIT LIABILITY OR DISCLAIM WARRANTIES, THE LIMITATIONS LISTED ABOVE MAY NOT APPLY TO YOU. IN THAT CASE, WE LIMIT OUR LIABILITY AND DISCLAIM WARRANTIES TO THE GREATEST EXTENT PERMITTED BY LAW.

**7. Dispute Resolution; Binding Individual Arbitration; Class Action Waiver.**

- A. Our consumer services department is available to address any concerns you may have regarding the Console. You may contact them by phone at 1-800-255-3700, by email at [useragreement@noa.nintendo.com](mailto:useragreement@noa.nintendo.com), or by regular mail sent to Nintendo of America Inc., Attn: User Agreement, 4600 150th Ave NE, Redmond, WA 98052 USA. Most matters are quickly resolved in this manner to our customer's satisfaction. Any matter we are unable to resolve and all disputes or claims arising out of or relating to this Agreement, including its formation, enforceability, performance, or breach (each, a "Claim"), with the exception of the matters described in section 7(C) below, shall be finally settled by binding arbitration administered by the American Arbitration Association in accordance with the provisions of its Commercial Arbitration Rules and the supplementary procedures for consumer-related disputes of the American Arbitration Association (the "AAA"), excluding any rules or procedures governing or permitting class actions. The arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve all Claims. The arbitrator shall be empowered to grant whatever relief would be available in a court under law or in equity. The arbitrator's award shall be binding on the parties and may be entered as a judgment in any court of competent jurisdiction. The parties understand that, absent this mandatory provision, they would have the right to sue in court and have a jury trial. They further understand that, in some instances, the costs of arbitration could exceed the costs of litigation and the right to discovery may be more limited in arbitration than in court. Any such arbitration shall be conducted by the parties in their individual capacities only and not as a class action or other representative action, and the parties waive their right to file a class action or seek relief on a class basis. If any court or arbitrator determines that the class-action waiver set forth in the preceding sentence is void or unenforceable for any reason or that an arbitration can proceed on a class basis, then the arbitration provision set forth in this Section 7 shall be deemed null and void in its entirety and the parties shall be deemed to have not agreed to arbitrate Claims.



B. The rules governing the arbitration may be accessed at [www.adr.org](http://www.adr.org) or by calling the AAA at +1-800-778-7879. To the extent the initial filing fee for the arbitration exceeds the initial filing fee for a lawsuit, we will pay the difference in fees. If the arbitrator finds the arbitration to be non-frivolous, we will pay all of the actual filing and arbitrator fees for the arbitration, provided your claim is less than \$75,000. The arbitration rules also permit you to recover attorney's fees in certain cases.

C. Section 7(A) does not apply to any Claim (i) in which a party is attempting to protect its intellectual property rights (such as its patent, copyright, trademark, trade secret, or moral rights, but not including its privacy or publicity rights), or (ii) that may be brought in small-claims court.

D. 30-Day Right to Opt Out. You have the right to opt out of the provisions of this Section 7 by sending written notice of your decision to opt out to the following address: Nintendo of America Inc., Attn: CS Admin, 4600 150th Ave NE, Redmond, WA 98052 within 30 days of purchasing the Nintendo video game console. Your notice should include the serial number and, if applicable, your purchase receipt. If you send this notice, then Section 7 will not apply to either party. If you do not send this notice, then you agree to be bound by this Section 7.

#### 8. Enforcement.

If any part of this Agreement is held to be invalid or unenforceable, that part will no longer apply to the parties but all other parts of the Agreement will remain in effect unless otherwise provided in this Agreement. If we do not enforce any provision of this Agreement, that will not be considered a waiver of our rights. Any waiver of this Agreement must be obtained in a written document signed by an authorized representative of Nintendo.

#### 9. Governing Law/Venue.

This Section 9 shall apply in the event that a dispute or Claim is not governed by Section 7:

A. If you reside in the United States or a country other than Canada, this Agreement and any disputes arising in connection therewith shall be subject to and governed by, construed and interpreted in accordance with the laws of the State of Washington, U.S.A., except for its conflict of law rules, and the parties consent to the exclusive jurisdiction of the courts located in King County, Washington, U.S.A.

B. If you reside in Canada, this Agreement and any disputes arising in connection therewith shall be subject to and governed by, construed and interpreted in accordance with the laws of the Province of British Columbia, Canada, except for its conflict of law rules, and the parties consent to the exclusive jurisdiction of the courts located in British Columbia, B.C., Canada.

**By clicking the "Accept" option, you acknowledge that you have read and agree to be bound by the End User License Agreement.**

#### About Nintendo

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#### Documents & Policies

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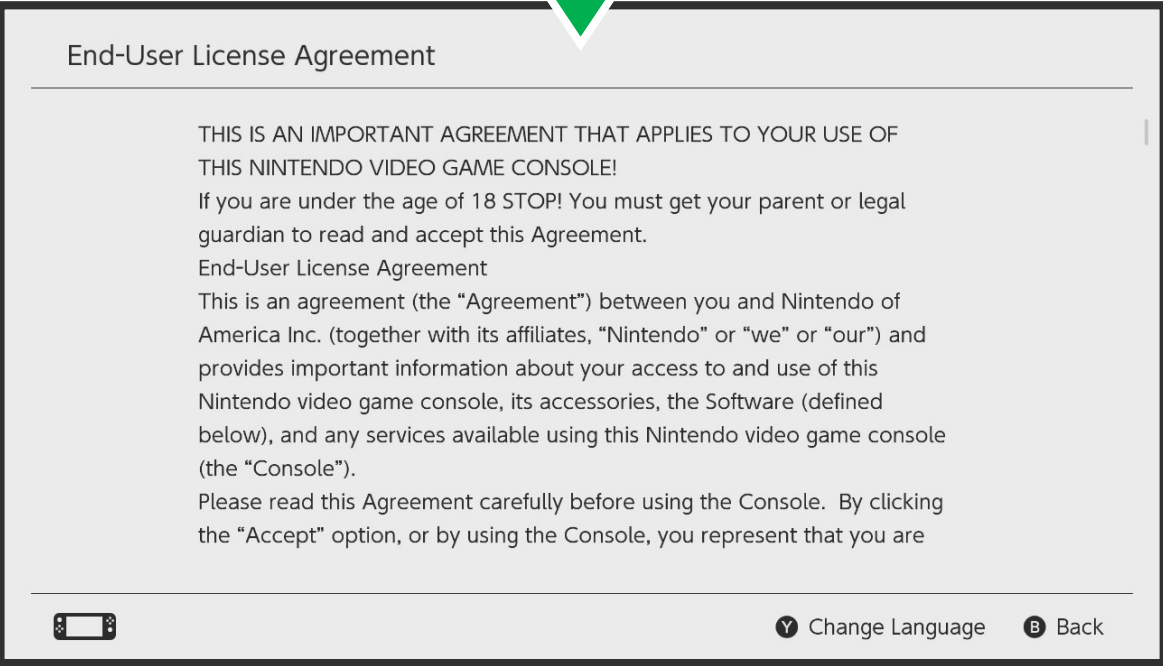
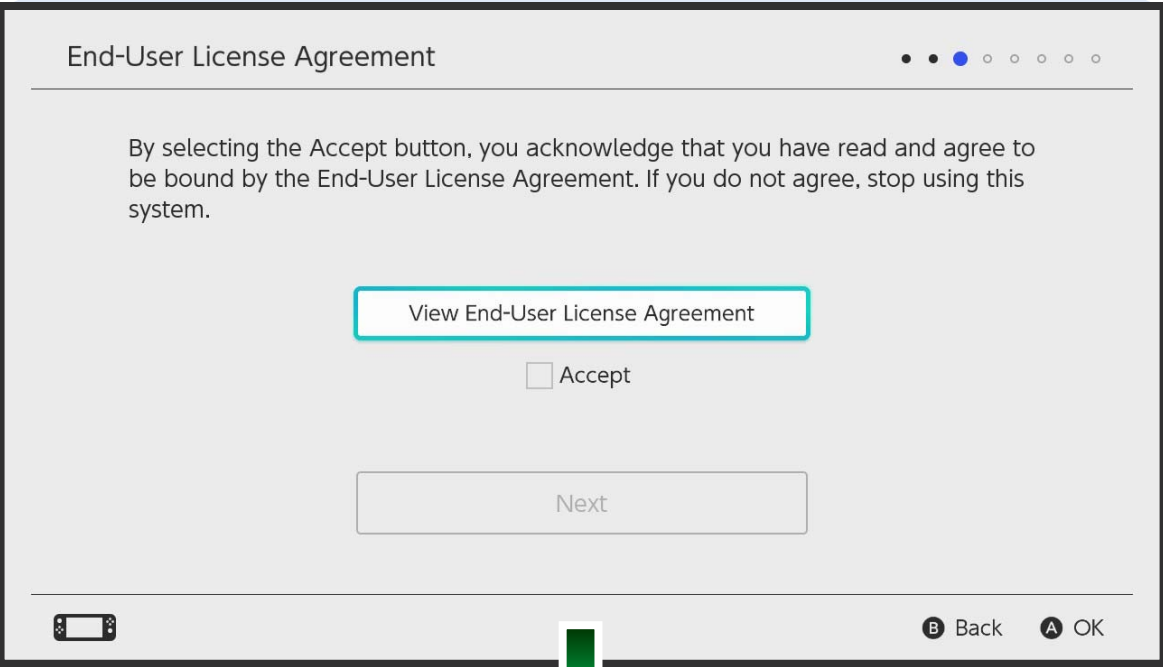
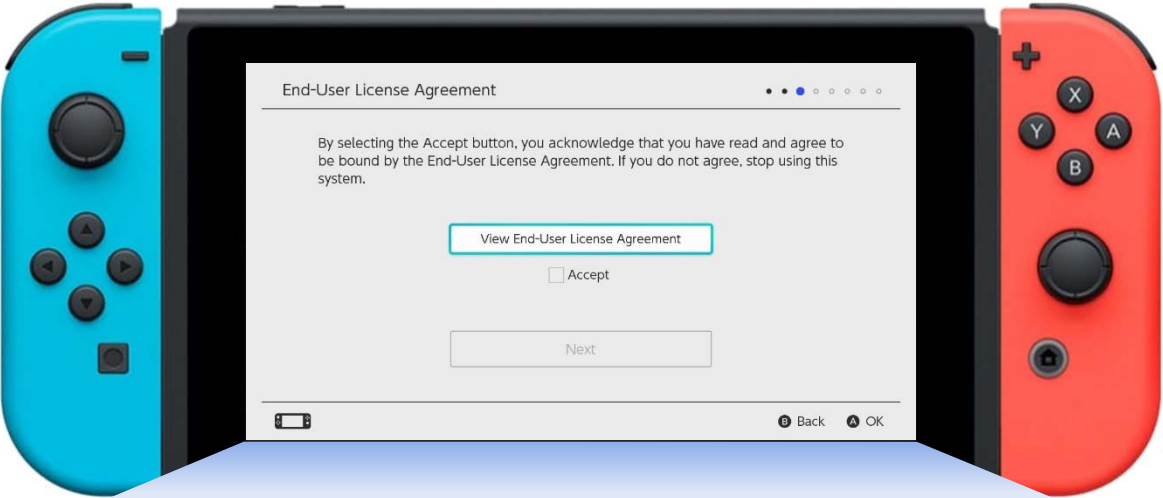
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Exhibit B

Exhibit B



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End-User License Agreement

By selecting the Accept button, you acknowledge that you have read and agree to be bound by the End-User License Agreement. If you do not agree, stop using this system.

View End-User License Agreement

☒ Accept

Next

  Back  OK



End-User License Agreement

By selecting the Accept button, you acknowledge that you have read and agree to be bound by the End-User License Agreement. If you do not agree, stop using this system.

View End-User License Agreement

☒ Accept

Next

  Back  OK